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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 542

JOSEPH P. BASS,

Petitioner,

vs.

BALTIMORE & OHIO TERMINAL RAILROAD
COMPANY, A CORPORATION,

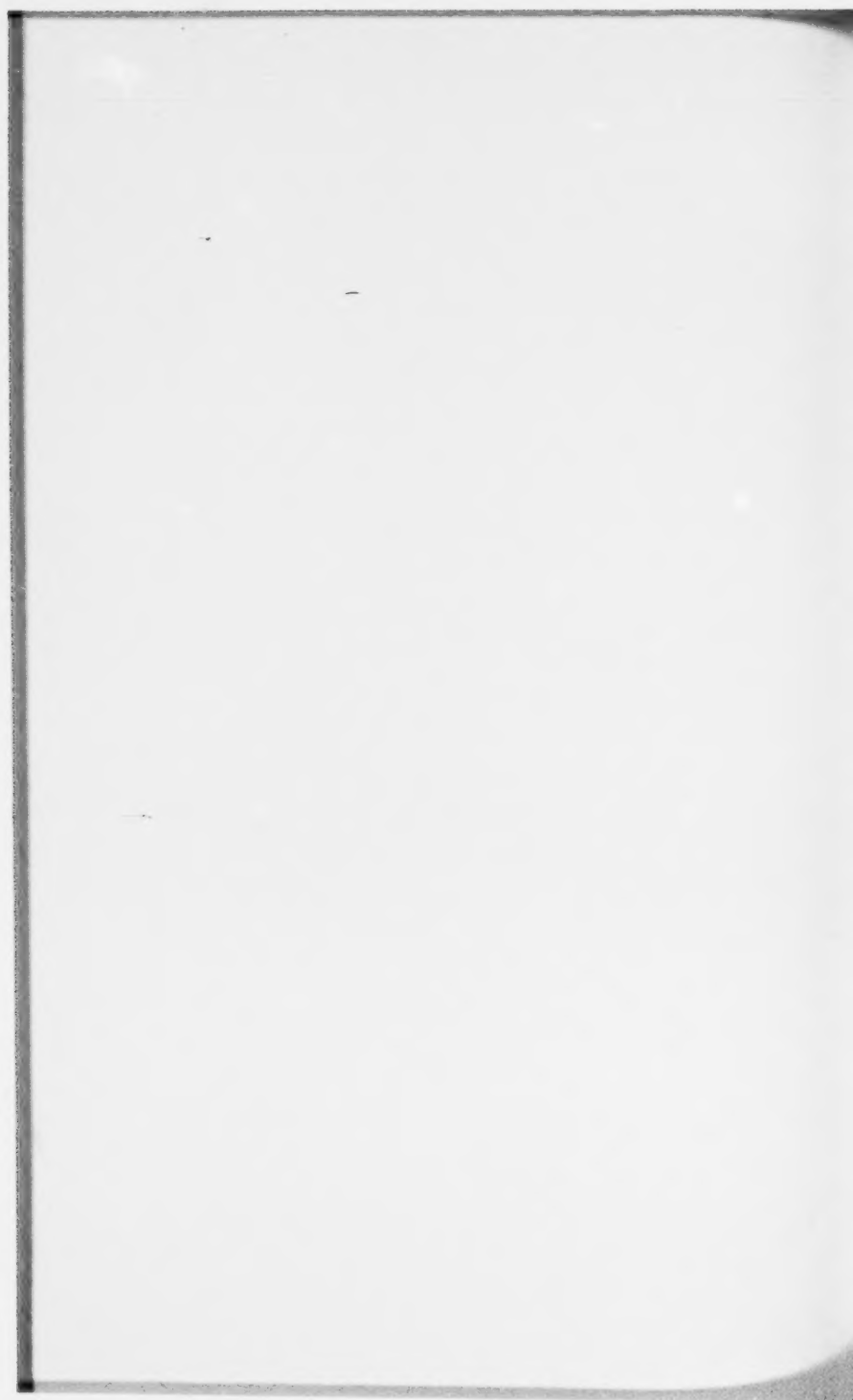
Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO
THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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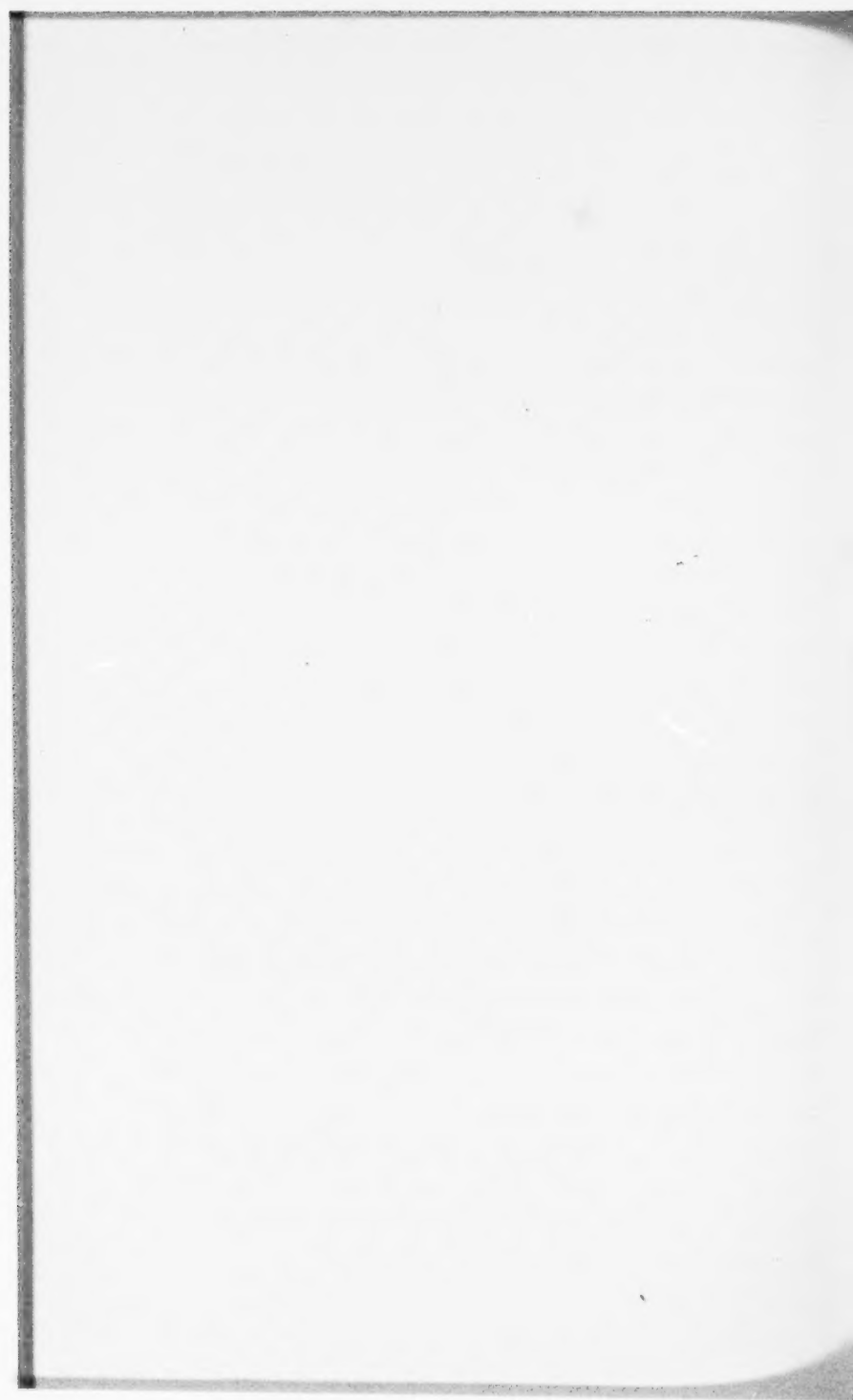


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**PETITION FOR WRIT OF CERTIORARI TO BE AD-
DRESSED TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT
AND BRIEF IN SUPPORT THEREOF.**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Your petition, Joseph P. Bass, hereinafter called the plaintiff, prays for a Writ of Certiorari to review a judgment against him in favor of the respondent, Baltimore & Ohio Terminal Railroad Company, a corporation, hereinafter referred to as defendant.

Summary and Statement of the Matter Involved.

This is an appeal from an order entered *sua sponte* dismissing plaintiff's appeal for the supposed reason that plaintiff's notice of appeal was inadequate. 142 F. (2) 779. (Tr. 183.)

The petitioner, Joseph P. Bass, the plaintiff below, brought a suit to recover damages for the loss of a leg under the Federal Employers' Liability Act against the defendant railroad company. The jury under an erroneous instruction found for the defendant. The trial court in contravention of the 1939 Amendment to the Federal Employers' Liability Act instructed the jury that the defense of assumed risk was applicable. The plaintiff appealed.

Briefs were filed by the plaintiff and defendant and the case was argued orally. The only issue raised was the error committed by the trial court in instructing the jury on the defense of assumed risk.

The notice of appeal complied substantially with all the requirements of the Rules and was filed within the three months after the denial of the motion for new trial. The notice of appeal was "from the order of Judge William H. Holly entered August 3, 1943, denying plaintiff's motion for a new trial." (Tr. 171.) The United States Circuit Court of Appeals found that there was no appeal from the judgment in the cause, the appeal being only from the order of the Court in denying motion for a new trial.

The plaintiff filed a petition for rehearing wherein he pointed out that the notice of appeal was in fact sufficient and that this position was sustained by decisions of other Circuit Courts of Appeal. At the same time, the plaintiff filed a petition asking leave to amend the notice of appeal to correct any error or insufficiency in the notice of appeal so that it would express the intention of the plaintiff. Attention was also directed to the fact that the appeal bond recited that "Joseph P. Bass, having filed in the clerk's office of the District Court, notice of appeal to the United States Circuit Court of Appeals for the Seventh District to reverse the judgment aforesaid." (Tr. 173.) But the Circuit Court of Appeals on June 29, 1944 refused

to reconsider its opinion and denied the plaintiff leave to amend the notice of appeal. This petition is filed to correct the error of the United States Circuit Court of Appeals in refusing to consider the appeal on its merits.

Statement of the Basis Upon Which This Court Has Jurisdiction to Review the Judgment.

The decision is in conflict with decisions of other Circuit Courts of Appeal on the same matter. (Rules of the Supreme Court 37-5 (b).) *United States v. Steinberg*, 100 Fed. (2) 124 (2nd Cir.) held the error was a formal mistake not affecting substantial rights; *Crump v. Hill*, 104 Fed. (2nd) 36, (5th Cir.) held a notice of appeal may be waived entirely; *Martin v. Clark*, 105 Fed. (2d) 685 (7th Cir.) Improper designation of parties inconsequential; *Milton v. United States*, 120 Fed. (2d) 794 (5th Cir.) Identical facts held to be purely technical error.

The Circuit Court of Appeals has decided an important question involving the construction of the Rules of Civil Procedure with respect to a notice of appeal, which question has not been, but ought to be settled by the Supreme Court of the United States. (Rules of the Supreme Court 37-5 (b).)

It declined to permit the plaintiff to amend his notice of appeal contrary to the provisions and intent of the Rules of Civil Procedure.

The Questions Presented and Reasons for Writ.

Inasmuch as Rule 73 of the Rules of Civil Procedure provides that "a party may appeal from a judgment by filing with the District Court a notice of appeal," therefore upon the filing of a notice of appeal, the appeal is perfected even though the notice may have been defective or insufficient in some respects. A notice of appeal is effective

to transfer jurisdiction to the Appellate Court even though it may defectively specify the parties to the judgment or the parts thereof appealed from or the name of the Court to which the appeal is taken.

There is an uncertainty of law inasmuch as other Circuit Courts of Appeals have decided the identical question in a contrary manner.

Even though the notice of appeal may have been defective in not properly describing the judgment appealed from, it was the duty of the Court to permit the plaintiff to amend the notice of appeal to conform with the appeal bond and to permit a consideration of the appeal upon its merits without regard to technical errors. The purpose of the Rules of Civil Procedure was to provide for liberality of amendment in order that causes may be considered quickly and effectually.

Prayer.

Your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit to the end that case therein numbered 8480 entitled Joseph P. Bass, plaintiff-appellant, *vs.* Baltimore & Ohio Terminal Railroad Company, defendant-appellee may be brought up and received on the complete, certified record thereof and determined by this Honorable Court as and by the Statutes of the United States and the Rules of Civil Procedure provided, and that the judgment of the Circuit Court of Appeals for the Seventh Circuit be reversed and that petitioner have such other and further relief as to this Honorable Court shall seem meet and proper.

JOSEPH P. BASS,
Petitioner.

ROYAL W. IRWIN,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

It is provided by Rule 73 of the Rules of Civil Procedure that a party may appeal from a judgment by filing a notice of appeal. The plaintiff did file within the time allowed a notice of appeal. It may be that the notice of appeal was defective in appealing from the order denying a new trial and it probably would have been more accurate to have appealed from the judgment itself. The judgment was entered at the time the verdict was returned. The motion for new trial was denied subsequently. Therefore, the judgment did not become final until the motion for new trial was denied. Misstatements in a notice of appeal which do not affect substantial rights should be disregarded.

After the notice of appeal was filed, a complete record was transmitted to the Circuit Court of Appeals. The defendant appeared and filed a brief raising no question as to the sufficiency of the notice of appeal.

We contend that when a notice of appeal was filed, even though it may have been defective in form, for the purpose of jurisdiction, it removed the entire cause to the Appellate Court. The inadvertant description of the order denying a new trial should not have prevented the Court from considering the appeal upon the merits. No one was misled. The defendant replied to the merits. The action dismissing the appeal was taken solely on the Court's own initiative. It was the duty of the Court to have disregarded technicalities. The mere fact that the Court entered an order dismissing the appeal concedes the fact that an appeal was perfected.

The same Court in a prior case decided the identical question in the opposite manner.

In *Martin v. Clarke*, 105 Fed. (2d) 685, (7th Circuit) the Court said:

"At the outset we are met with appellee's motion to dismiss this appeal because of a misstatement of the parties in the description of the judgment appealed from, that is to say, the notice of appeal erroneously described the order appealed from as an appeal from an order of October 12, 1938, wherein the court found the issues for the defendant, whereas the judgment of the court was in fact in favor of the plaintiff and against the defendant for the sum of \$19 and costs of the suit. This was the only judgment entered by the trial court. * * *

"The object of the notice is merely to advise the opposite party that an appeal has been taken from a specific judgment in a particular case; **if the notice is plain and explicit in this particular and sufficient in all other respects, it ought not to be declared ineffectual because of some slight mistake in the description of the judgment.** Sections 472, 473, 3 Am. Jur. pp. 168 and 169. **Courts are liberal in construing the sufficiency of a notice of appeal, and, where it appears from the notice, as in the instant case, that there is sufficient information acquainting appellee as to the judgment appealed from (the appellee not being prejudiced or misled) the mere fact that the designation of plaintiff and defendant was interchanged is no ground for dismissing the appeal. Accordingly, the motion to dismiss is overruled.**" (Bold face type ours.)

It has been held by the Fifth Circuit Court of Appeals that the filing of a notice of appeal may be waived entirely and that a waiver signed by the defendant may take the place of the notice of appeal. The decision is in conflict with the decision of the Seventh Circuit.

In *Crump v. Hill*, 104 Fed. (2d) 36 (5th Circuit), it appears that no notice of appeal was filed within the required time, but in its place was filed a waiver of service thereof, appellee's acceptance of designation, and entry of ap-

pearance. It was held to be a substantial compliance with Rule 73. The Court said:

"The reason for the Rule (Rule 73), however, to set the appeal in motion by mere notice without judicial action, makes it quite clear we think that the appellant, when he procured from appellee and filed, her waiver of notice, her acceptance of designation, and her entry of appearance, just as effectively started his appeal as if he had merely filed the notice of appeal with, and left its service to the Clerk. It is true enough that the starting of an appeal within the time fixed is jurisdictional and that good practice requires conformity to the formal requirements of the Rule. **But it would, we think, be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights.**" * * *

"**We think that it was substantial compliance with the letter of Rule 73 to file, instead of the notice of appeal, the waiver of service thereof and appearance thereto, but if this ruling does violate its letter, it certainly accords with and gives effect to its substance and spirit.** Indeed, it would we think be an exhibition of unsound reasoning and clear abuse of judicial discretion for us to start the Rule off barnaced with the rigid and rigorous holding appellee's motion seeks." (Bold face type ours.)

Other Courts have considered the form of notices of appeal and have held that where it appears that the error was one of form not affecting substantial rights, it is the duty of the Court to disregard the imperfection and to treat the appeal as properly before the Court.

In the case of *United States v. Steinberg*, 100 Fed. (2d) 124 (2nd Circuit), the Court said:

"The defendant appealed from a 'final order and judgment * * * entered on the 15th day of Feb-

ruary, 1936, which in substance denied his motion to vacate or modify the default judgment entered in the above entitled action on October 4, 1937.' He prayed that 'said order and judgment may be reversed and the defendant's motion aforementioned granted'."
 . . .

The plaintiff contended there could be no appeal from the order refusing to modify the judgment. But the Court said:

"The only question is whether, because of its form, it reached judgment at all. Verbally of course it did not, but it appears to us that the error was one of those formal mistakes which do not 'affect substantial rights', and which we are empowered, and indeed directed, to disregard. Section 391, Title 28, U. S. Code, 28 U. S. C. A. Paragraph 391. We hold therefore that upon this appeal, we may reconsider the original judgment, and we proceed to the merits." (Bold face type ours.)

In 6 Federal Rules Service, page 785 it is stated:

"Misdescription of the judgment appealed from is generally regarded as a matter which may be relieved against even after expiration of the time to appeal if the original notice of appeal was sufficiently definite to apprise the adverse parties of the appellant's intention. If the meaning is discernible, although the notice was 'inartificially' phrased, allowance of amendment is not an extension of the time to appeal."

The author has cited nine cases in support of this statement.

Powers of Appellate Courts.

Section 269 as amended of the Judicial Code provides:

"All United States Courts shall have power to grant new trials. On the hearing of any appeal or motion for a new trial in any case, **the Court shall give judgment after an examination of the entire record before the Court without regard to technical errors, difficul-**

ties or exceptions which do not affect the substantial rights of the parties." (Bold face type ours.)

Authorities Cited in Opinion.

In support of its position, the Circuit Court of Appeals cited the case of *Youdan v. Majestic Hotel Company*, 125 Fed. (2d) 15. Curiously, the same Judge who wrote the opinion of the case at bar wrote the opinion in *Youdan v. Majestic*. The case is not at all in point. There an appeal was taken from a *motion granting a new trial*. Let us point out that there is no provision in the Rules of Civil Procedure for an appeal from a motion granting a new trial. No judgment was entered in the case from which an appeal might be taken. There was a very severe attempt made before the Advisory Committee to include in the rules a provision for an appeal from an order granting a new trial. It was beaten and this Court did not include in the rules such a provision. The case, therefore, should not be considered as an authority.

The same is true with reference to the case of *Marshall v. Cashman*, 111 Fed. (2d) 140, cited by the Court. The error assigned was the abuse of discretion of the trial court in granting a new trial.

In support of its position, the Court also cited *Fairmont Glass Works v. Coal Company*, 287 U. S. 474. **This case was decided January 9, 1933, several years before the adoption of the Rules of Civil Procedure**, at a time when a notice of appeal was unknown. Manifestly this case cannot be considered an authority in the construction of the Rules of Civil Procedure. (Bold face type ours.)

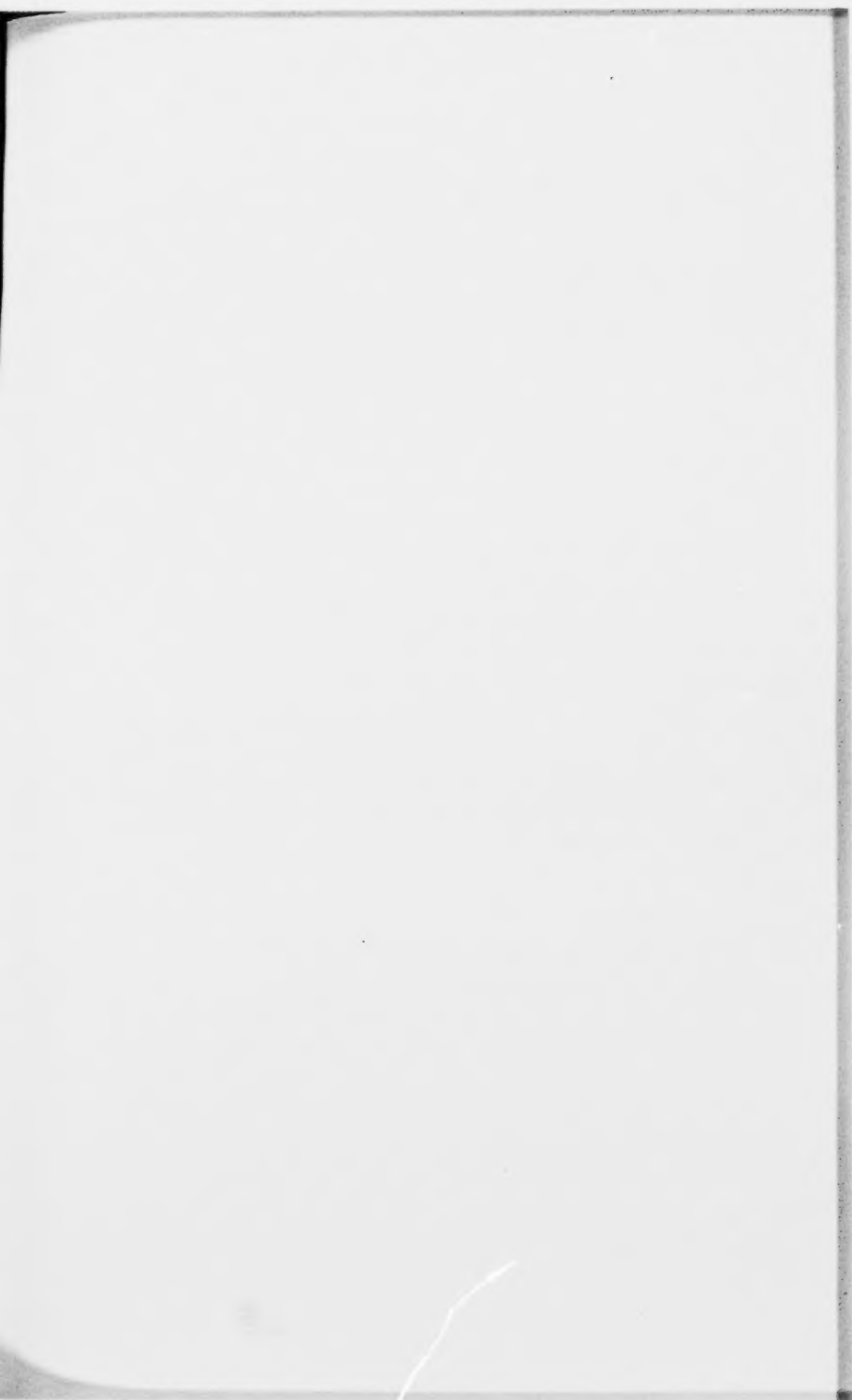
Pfister v. Finance Corporation, 317 U. S. 144, also cited is a bankruptcy case based upon bankruptcy law and cannot be considered as an authority in civil matters.

Plaintiff's Right to Amend.

Even if it be conceded that the notice of appeal was insufficient, it was the duty of the Court to have allowed plaintiff's motion for leave to amend. The Rules of Civil Procedure provide for liberal amendments. If there were a substantial compliance, it was the duty of the Court to have permitted the plaintiff to amend the notice of appeal. It was an abuse of discretion to refuse. The processes of appeal are an extremely simple procedure and it was not intended that a failure to comply with the rules to the exact letter should defeat substantial rights. It has been held that it is not even necessary to file a notice of appeal where a proper waiver of notice of appeal has been filed. The notice of appeal ought not to be declared ineffectual because of some mistake not affecting substance. It was the duty of the Court to permit an amendment of the notice that it might express the intention of the parties as shown otherwise by the record.

Respectfully submitted,

ROYAL W. IRWIN,
Attorney for Petitioner-Plaintiff.





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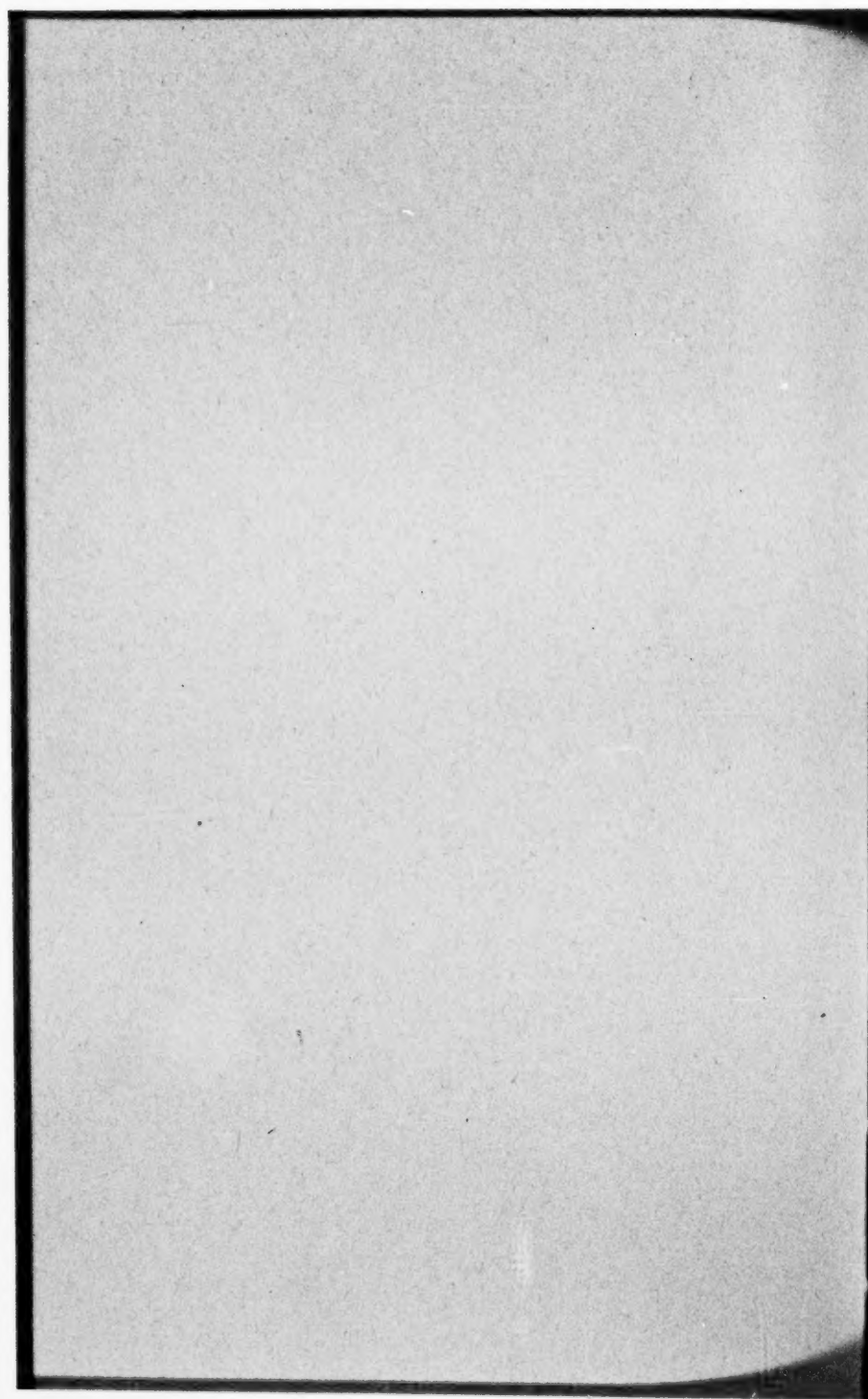
BALTIMORE & OHIO TERMINAL RAILROAD
COMPANY, A CORPORATION,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI.**

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SUMMARY STATEMENT.

The questions are jurisdictional: The petition for certiorari was not duly applied for in the Supreme Court within the three month's statutory limitation	5
The Circuit Court of Appeals properly dismissed the appeal in that the order appealed from, that of overruling motion for new trial, was not a final, appealable order under Federal practice and statutes	

TABLE OF CASES AND STATUTES CITED.

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BALTIMORE & OHIO TERMINAL RAILROAD
COMPANY, A CORPORATION,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI.**

**PRELIMINARY STATEMENT AS TO JURISDICTION
AND JURISDICTIONAL QUESTIONS.**

In this case, the writ of certiorari is sought to review the judgment of the Circuit Court of Appeals for the Seventh Circuit, which dismissed an appeal by petitioner, plaintiff below, in a cause in the District Court for the Northern District of Illinois, Eastern Division (rec. 185). This dismissal was on June 10, 1944 (rec. 185).

Rehearing was asked for by petitioner in the Circuit Court of Appeals by petition filed June 26, 1934 (rec. 190). This petition for rehearing was denied June 30, 1944 (rec. 208).

The petition for certiorari herein was not filed until more than three months thereafter. It was filed October

2, 1944, which is more than three months after June 30, 1944 (Docket, Supreme Court).

The statute in this regard is Title 28, U.S.C.A., Sec. 350:

“No writ * * * or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor duly be made within three months after the entry of the judgment or decree * * *.”

Thus there is a preliminary question of jurisdiction to entertain the application for the writ.

On the authority of *Citizens Bank of Michigan City v. Opperman*, 249 U. S. 448, 63 L. ed. 701, where a petition for rehearing has been entertained in the lower court, the three months' limitation begins to run from the date of the denial of the petition.

It follows, it is submitted by respondent, that the application for the writ of certiorari herein was filed too late and should be dismissed.

Wherefore, respondent asks that the petition for writ of certiorari be dismissed.

As to the questions raised in the petition for certiorari, respondent further contends the Circuit Court of Appeals properly dismissed petitioner's appeal in the cause. It was taken from the order of the District Judge overruling a motion for new trial and the Circuit Court had no jurisdiction for an appeal from such order.

STATEMENT OF THE CASE.

On the questions as presented on the record to the Supreme Court, it is submitted for respondent, there is no occasion for further statement on the jurisdictional questions than has already been made.

SUMMARY OF POINTS PRESENTED AND AUTHORITIES.

Under federal practice and the federal statute on appeals from the District Court to Circuit Courts of Appeals, an order overruling a motion for new trial is not a final judgment within sec. 128 of the Judicial Code (U. S. C. A. Title 28, Sec. 225) fixing appellate jurisdiction and an appeal therefrom was properly dismissed.

Luckenbach Steamship Company, Inc. v. United States, 272 U. S. 533, 71 L. ed. 394.

United States v. Endicott, 223 U. S. 524, 56 L. ed. 535.

Pfister v. Northern Illinois Finance Corp., 317 U. S. 144, 63 Sup. Ct. 133.

Brocket v. Brocket, 2 How. 238, 11 L. ed. 251.

Brown v. Clarke, 4 How. 4, 11 L. ed. 850.

Sec. 128, Jud. Code, Title 28 U.S.C.A. sec. 225.

Title 28 U.S.C.A. sec. 230.

ARGUMENT.

Under federal practice and the federal statute on appeals from the District Court to Circuit Courts of Appeals, an order overruling a motion for new trial is not a final judgment within sec. 128 of the Judicial Code (U. S. C. A. Title 28, Sec. 225) fixing appellate jurisdiction and an appeal therefrom was properly dismissed.

Petitioner was plaintiff below and respondent was defendant in an action under the F. E. L. A. (rec. 2-4). Following a verdict of not guilty (rec. 168), final judgment (that defendant-respondent go hence without day) was entered April 8, 1943 (rec. 168). Petitioner made a written motion for new trial April 16, 1943 (rec. 169), which was overruled by an order of court entered August 3, 1943 (rec. 171). It was from the latter order "denying plaintiff's motion for new trial" the appeal herein was taken by plaintiff-petitioner by a notice of appeal filed November 2, 1943 (rec. 171).

It was because the appeal was taken from the order overruling the motion for new trial, rather than from the final judgment entered, the Seventh Circuit Court on appeal dismissed the appeal *sua sponte*. In doing so it said:

"Under federal practice such an order is not subject to appeal, although it may be reviewed for error in law, on appeal from a final judgment, when the ruling has been properly assigned as error" (rec. 184).

It is the position of respondent that the action of the Court of Appeals was proper in view of authorities on federal practice and the statutory provisions on appeals.

The practice in this regard reflects the statute as well. The latter, it is suggested, must necessarily be followed to obtain an appeal, for as said in *Luckenbach Steamship Company, Inc. v. United States*, 272 U. S. 533, 71 L. ed. 394, 395:

“And apart from the nature of these suits, the well settled rule applies that an appellate review is not essential to due process of law, but is a matter of grace.”

Applicable statutes are:

U.S.C.A. sec. 225 (sec. 128, Judicial Code). (a) Review of final decisions. “The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—

First. In the district courts, in all cases save where a direct review may be had in the Supreme Court under section 345 of this title.”

Sec. 230. No writ of error or appeal intended to bring any judgment or decree before a circuit court shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.”

It is submitted it is the plain purport of the two foregoing sections (to be read together) that it is final judgments which are to be appealed from the District Court to the Circuit Courts of Appeal, and within three months, not other intermediate or interlocutory orders.

It is petitioner's underlying and counter-proposition that his notice of appeal was only supposedly inadequate and that he merely made misstatements therein (Supporting brief, page 5). But we think it clear the notice of appeal manifested an assumption that an order overruling a motion for new trial was an appealable order. There is no ambiguity or uncertainty in or about the fact such was the order selected as the basis for review. The point

is simply whether such order was the subject for an appeal. The Circuit Court of Appeals held it was not and we believe that view is in accordance with the federal practice and statutes from early days on down to the present time.

In this regard, decisions from the Supreme Court have distinguished orders overruling new trials and final judgments.

In *Brown v. Clarke*, 4 How. 4, 11 L. ed. 850, the court stated the rule in federal courts was that error did not lie for the refusal of the court below to grant a new trial. In stating the federal rule, it pointed out the practice to the contrary in Mississippi was by virtue of a state statute.

Again, the distinction between such orders and judgments is shown by the opinion of the Supreme Court in *Luckenbach v. Steamship Company*, 272 U. S. 533, 71 L. ed. 394. In that case there was involved a judgment, and a motion for new trial overruled, together with appeals therefrom. The court said, page 395:

“Plainly the second (new trial order) was not (appealable), for it was an order which was not appealable. But the first was from the judgment and we think it well taken.”

It is to be further noted in the foregoing *Luckenbach* case the court gave the pendency of the motion for new trial the effect of preventing judgments from becoming final so as not to cause the time to run against the right to appeal from the judgment.

The appeal in the case was from the court of claims rather than a circuit court of appeals but the rule in the particular regard is the same for both courts. Such is well indicated by *United States v. Endicott*, 223 U. S. 524, 56 L. ed. 535, relied on in the foregoing *Luckenbach* case.

In *United States v. Endicott*, 223 U. S. 524, 56 L. ed. 535, referred to, there was a judgment entered against the United States, May 18, 1908. A motion for new trial was overruled in January, 1909 (January 4th). United States gave notice of appeal from a judgment of the latter date and ran into a motion to dismiss. The Supreme Court said, page 542 (L. ed.):

“The grounds for the motion to dismiss are these: (a) that the appeal was not taken within ninety days after judgment (R. S. sec. 708; U. S. Comp. Stat. 1901, p. 575), and (b) that the appeal prayed for and allowed was not from the judgment of January 4, 1909, ‘but was merely from the order overruling the motion for a new trial.’

“The motion is without merit. *The general rule governing the subject of prosecuting error or taking appeals from final judgments or decrees* is, we think, applicable to judgments or decrees of the court of claims, and that rule treats a judgment or decree entered in the cause as not final for the purposes of appeal until the motion for new trial or petition for rehearing, as the case may be, when entertained by the court, has been disposed of; and the time for appeal begins to run from the date of such disposition.” (Emphasis supplied.)

Much to the same thought is *Pfister v. Northern Illinois Finance Corporation*, 317 U. S. 144, 63 Sup. Ct. 133, 137, holding “that an appeal does not lie from the denial of a petition for rehearing,” citing in support among other cases, *Brocket v. Brocket*, 2 How. 238, 11 L. ed. 251.

To refer briefly to the jurisdictional cases relied on by petitioner as purporting to show conflict in the decision of the Circuit Court of Appeals for the Seventh Circuit and those from Second and Fifth Circuits, in *United States v. Steinberg*, 100 F. (2d) 124 (CCA 2nd) cited, the court had a default judgment before and order denying modification thereof. The court did not permit a formal mistake

merely on the date of the last order prevent consideration of the default judgment.

In *Crump v. Hill*, 104 F. (2d) 36 (CCA 5th), the court simply treated an acknowledgement of service of notice of appeal and designation of record and an appearance on appeal as the equivalent of filing notice of appeal.

In *Martin v. Clarke*, 105 F. (2d) 685, from the instant Seventh Circuit as well, the court merely held that where there was sufficient information in the notice of appeal to acquaint appellee as to the judgment appealed from, an interchange in designation of plaintiff and defendant was no ground to dismiss the appeal.

Milton v. United States, 120 F. (2d) 795 (CCA 5th), also cited, was a case which the Circuit Court of Appeals had previously sent back for trial on the merits. In such retrial there was a verdict of not guilty. A motion for new trial was made; it was overruled, and an appeal was taken from the order overruling this motion. It ran into a motion to dismiss for want of finality in the decision appealed from under Section 128, Judicial Code. The Court did actually state, contrary to petitioner's point, there was not such a final judgment under this section fixing appellate jurisdiction, but, it went further, as the court said, page 796, in the interests of justice and to avoid prolonging litigation to no good purpose, and added, "without intending to create a precedent, we consider we may disregard the motion to dismiss the appeal and hear the case on the merits."

There is nothing in these cases relied on for conflict in decisions of Circuit Courts of Appeal for jurisdiction on certiorari to indicate that the decision in the instant case was other than in accord with the applicable federal practice authorities and statutes, we respectfully submit.

CONCLUSION.

Further, petitioner asserts that he was entitled to amend the notice of appeal so as to read as from a judgment (for the first time) in the Circuit Court of Appeals and further claims such right to amend under the Rules of Civil Procedure. At the outset on this proposition, it is to be noted the Rules in question were promulgated for District Courts, not the Circuit Courts of Appeal. Rule 1 is specific on the scope of the rules as for the District Courts.

Moreover we do not see that Rule 73 of these rules also cited by petitioner aids petitioner's right to amend. This rule in terms presumes the notice of appeal will be from a judgment, not from some other intermediate or interlocutory order in the cause.

Also, Rule 73 could have no reference to making a notice of appeal read as from a judgment, particularly so by amendments amounting to transmutations after the appeal had reached the reviewing court.

Moreover, clearly the petition to amend to transmute the notice of appeal into a judgment appeal for the first time came much too late in the Circuit Court. It was filed June 23, 1944 (rec. 186) and denied (rec. 207) along with a rehearing in the cause, June 30, 1944 (rec. 208).

In this regard the judgment of April 8, 1943, became final for purposes of appeal on the overruling of the motion for new trial August 3, 1943 (rec. 171), and when the notice of appeal in the cause was filed November 2, 1943

(rec. 171), the three months time limit for appeals under sec. 230 U.S.C.A. (previously set out) expired the next day. Consequently, any notice of appeal thereafter in June, 1944, came too late under the latter three months limitation statute. This is one reason for, whatever reason the Circuit Court of Appeals may have had, in declining to permit the proposed amendment.

Wherefore, it is submitted that the appeal was properly dismissed herein and the petition for the writ of certiorari should be denied.

Respectfully submitted,

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